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The Judicial Discretion to Exclude Relevant Evidence: Perspectives from an Indian Evidence Act Jurisdiction

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The judicial discretion to exclude relevant evidence: perspectives from an Indian Evidence Act jurisdiction

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Abstract Stephen's ground-breaking Indian Evidence Act contained ideas that appear unfamiliar in the context of modern rules of evidence. Singapore is an Indian Evidence Act jurisdiction which has retained those ideas, such as the non-distinction between relevance and admissibility, the framing of exclusionary rules in inclusionary terms, and the prohibition against relying on common law developments inconsistent with the Evidence Act. These peculiarities should have presented obstacles to the applicability of the common law concept of the judicial discretion to exclude relevant evidence, but this has not been the case. In this article, I first suggest why Singapore courts might have been attracted to the concept, but I then highlight fundamental uncertainties regarding the concept's scope and normative justification. I proceed to propose an alternative paradigm for Singapore, namely using relevance and reliability as the only touchstones for admissibility of all evidence in criminal proceedings. The various advantages of this paradigm are also highlighted.

Keywords Exclusionary discretion; Balancing prejudicial effect and probative value; Indian Evidence Act 1872; Singapore Evidence Act; *R* v *Sang*

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1. Examining the exclusionary discretion in light of certain features of the Indian Evidence Act

When Sir James Fitzjames Stephen drafted the Indian Evidence Act of 1872 (which was supposed to be a complete formulation of English evidence law at that point in time),[1] he probably would not have imagined that several jurisdictions which adopted his statute would still be using it almost 150 years later.[2] Ground-breaking as it was,[3] when viewed through the lens of contemporary evidence law developments in the common law world,[4] Stephen's Evidence Act contains a number of peculiarities, and pertinent for present purposes are three of them.

First, Stephen did not draw a distinction between relevance and admissibility;[5] thus, what is found relevant under the statute's relevancy provisions is admissible, and the need to consider the difference between legal relevance and logical relevance is obviated.[6] Secondly, in an attempt to make the statute as uncomplicated as possible, Stephen wanted its relevancy provisions to be expressed in inclusionary terms rather than exclusionary terms; thus, the exceptions to the common law exclusionary rules (as they stood in the late 1800s) are directly captured by the various inclusionary rules in the statute.[7] This also obviates the need to consider whether a piece of evidence that has fulfilled the criteria of the (Indian Evidence Act) relevancy provisions in question can nevertheless be excluded or deemed inadmissible by the court.[8]

1 J. Pinsler, *Evidence and the Litigation Process*, 3rd edn (LexisNexis: Singapore, 2010) 18.

2 Ibid. at 19. Jurisdictions include Singapore (the main jurisdiction to be discussed here), Bangladesh, Malaysia, Myanmar, Nigeria, Pakistan, South Africa and Sri Lanka. India still uses the statute as well.

3 C. Tapper, *Cross & Tapper on Evidence*, 12th edn (Oxford University Press: Oxford, 2010) 73.

4 See Chin T. Y., 'Remaking the Evidence Code: Search for Values' (2009) 21 Singapore Academy of LJ 52 at 53: 'A number of the 19th century rules (of the Indian Evidence Act) were shown to be based on falsifiable psychological assumptions, dubious epistemic premises or outdated political or social mores: these were modified, overruled or repealed not just by judicial decision alone but also by legislation in [some] jurisdictions.'

5 Tapper, above n. 3 at 73.

6 Pinsler, above n. 1 at 56, R. Margolis, 'The Concept of Relevance: In the Evidence Act and the Modern View' (1990) 11 Singapore LR 24 at 24–33, Singapore Law Reform Committee, *Report of the Law Reform Committee on Opinion Evidence* (2011) 6–10. See also J. B. Thayer, *A Preliminary Treatise on Evidence at the Common Law* (Little Brown: 1898) 265: 'The law furnishes no test of relevancy. For this, it tacitly refers to logic and general experience'. However, it has been said (Margolis at 32) that as regards Stephen's terminologies, 'while purporting to be a concept of logical relevance the term "relevant" means something much more restrictive than logically probative'.

7 Pinsler, above n. 1 at 38–9.

8 Tapper, above n. 3 at 73, Margolis, above n. 6 at 35–41. For a very useful flowchart of how admissibility works in England, see P. Roberts and A. Zuckerman, *Criminal Evidence*, 2nd edn (Oxford University Press: Oxford, 2010) 99.

Whereas the first two characteristics apply to most Indian Evidence Act jurisdictions, the third peculiarity is probably confined to the Evidence Act of Singapore (hereinafter 'Evidence Act' for disambiguation).[9] The Evidence Act, enacted in 1893,[10] states in s. 2(2):

> All rules of evidence not contained in any written law, so far as such rules are inconsistent with any of the provisions of this Act, are repealed.

This peculiarity is unique to Singapore because most, if not all, Indian Evidence Act jurisdictions repealed their equivalent of s. 2(2) quite early on.[11] The literal words of s. 2(2) present immediately apparent problems, chief of which is that Singapore courts cannot rely on (the ever-changing) common law rules on evidence unless those rules are consistent with the (essentially static) Evidence Act. Unsurprisingly perhaps, the rigid s. 2(2) was virtually completely ignored or glossed over by Singapore courts in evidence law decisions for more than a century despite the precedence necessarily accorded to statutory law.[12] With the passage of time, the resultant unprincipled importation of common law concepts created increasing contradictions between many provisions in the Evidence Act and Singapore case law.[13]

One of the common law concepts that Singapore courts had, for a long time, adopted without much restraint was the judicial discretion to exclude relevant evidence. This is a common law concept of some vintage.[14] In its most basic form, the concept can be described as a court having the residual discretion in criminal proceedings to exclude a piece of evidence if its prejudicial effect outweighs its probative value; this discretion is residual because it is exercised even after the piece of evidence has been deemed relevant (and in the context of the Evidence Act, admissible),[15] and this discretion can be exercised on the basis of a whole host of reasons and normative justifications, depending on the jurisdiction in question

9 Chapter 97, Revised Edition 1997.

10 Pinsler, above n. 1 at 18.

11 For instance, India itself repealed its equivalent of s. 2(2) in 1938: Margolis, above n. 6 at 26. What is interesting though is that there is a view that the statute remains a 'complete code' in India and therefore it 'does not permit the importation of any principle of English Common Law relating to evidence in criminal cases to the contrary': V. R. Manohar (ed.), *Ratanlal & Dhirajlal's The Law of Evidence*, 24th edn (LexisNexis: India, 2011) 2.

12 J. Pinsler, 'Approaches to the Evidence Act: the Judicial Development of a Code' (2002) 14 Singapore Academy of LJ 365 at 366–77.

13 Ibid.

14 A. Keane, J. Griffiths and P. McKeown, *The Modern Law of Evidence*, 8th edn (Oxford University Press: Oxford, 2010) 44–5.

15 Ibid. See also *Muhammad bin Kadar* v *Public Prosecutor* [2011] 3 SLR 1205 at [146]–[147].

(some of which have implemented legislation to either curtail or expand the discretion).[16] The practice of Singapore courts arbitrarily adopting the concept of exclusionary discretion without due consideration of the provisions in the Evidence Act was always going to be a problem, particularly since the nature of the discretion seems, on the face at least, fundamentally at odds with how relevancy and admissibility were conceptualised by Stephen in the Evidence Act (see the first two peculiarities above).[17] There is also no proof that Stephen was cognisant of anything akin to the concept of exclusionary discretion when he drafted the Evidence Act.[18] A commentator recently encapsulated the full range of the problem as follows:

> Although the common law has long recognised the propriety of a residual discretion to exclude evidence, which, if admitted, would cause the accused person to suffer injustice, the scope of this principle has been tainted by uncertainty, repeatedly modified by the courts and ultimately reformulated by legislation in England. In Singapore ... the courts seemed to have been satisfied in applying successive common law developments concerning the scope of the discretion without attempting to rationalise the governing principle in the context of the Evidence Act ...[19]

Then came the 2008 seminal decision of *Law Society of Singapore* v *Tan Guat Neo Phyllis*, where the Chief Justice bucked the jurisprudential trend and declared that in view of s. 2(2) of the Evidence Act, 'new [common law] rules of evidence can be given effect to only if they are not inconsistent with the provisions of the [Evidence Act] or their underlying rationale'.[20] Subsequent important cases by Singapore's apex court (Court of Appeal) have affirmed the importance of adhering to s. 2(2) when modern common law rules of evidence are being considered.[21] Evidence law in Singapore was finally going to develop along a principled trajectory, but in *Tan Guat Neo Phyllis* (which concerned a case of evidence allegedly obtained by entrapment), the court also had the golden opportunity to clarify whether the

16 See E. Tong, 'Illegally Obtained Evidence and the Concept of Abuse of Process: A Possible Reconciliation?' (1994) 15 Singapore LR 97 at 100–17.

17 Pinsler, above n. 12 at 370–1, the dissent of Ambrose J in *Cheng Swee Tiang* v *Public Prosecutor* [1964] MLJ 291. For an opposing view see Tan Y. L., 'Sing a Song of *Sang*, a Pocketful of Woes?' [1992] *Singapore Journal of Legal Studies* 365 at 413.

18 Tan, above n. 17 at 366–71.

19 J. Pinsler, 'Whether a Singapore Court Has a Discretion to Exclude Evidence Admissible in Criminal Proceedings' (2010) 22 Singapore Academy of LJ 335 at 335.

20 [2008] 2 SLR(R) 239 at [117].

21 See *Lee Chez Kee* v *Public Prosecutor* [2008] 3 SLR(R) 447 at [116], *Muhammad bin Kadar* v *Public Prosecutor* [2011] 3 SLR 1205 at [51].

concept of exclusionary discretion was compatible with the Evidence Act; jurisprudence prior to *Tan Guat Neo Phyllis* had effectively adopted indecipherable and irreconcilable positions.[22] After an extensive survey of the authorities, the court made the broad conclusion that Singapore courts do possess the discretion to exclude technically admissible evidence, if such evidence would result in obvious injustice at the trial.[23] This was a clear reference to (some variant of) the concept of exclusionary discretion, but what was then *obiter dictum* in *Tan Guat Neo Phyllis* has now become binding *ratio decidendi* following the subsequent seminal decision in *Muhammad bin Kadar*.[24] *Muhammad bin Kadar* will be explored in greater detail below, but suffice to say for now that the Court of Appeal (citing *Tan Guat Neo Phyllis*) held that if statements made by an accused to the police suffer from deliberate and serious procedural lapses, the court can exclude such otherwise admissible evidence using its exclusionary discretion.[25]

2. Critiquing the exclusionary discretion in the context of Singapore's law on evidence

A. Overview of the critique

I disagree with the notion that the exclusionary discretion (as characterised in *Tan Guat Neo Phyllis* and *Muhammad bin Kadar*) has been properly conceptualised and applied in Singapore. In this article, I argue that the concept remains unclear as to scope and operation; I also argue that there is still no satisfactory theory that justifies its continued use. Further, in light of the peculiarities of the Evidence Act as outlined above, I propose that the more principled approach in Singapore is to use only relevance and reliability as the twin touchstones for admissibility of all evidence; once evidence is deemed admissible, there should be no residual discretion to exclude it for whatever reason. Indeed, a close and thorough examination of the Evidence Act will reveal that Stephen's conception of relevance is best understood as something that is rationally probative but undergirded by considerations of reliability at the same time. I make the subsidiary point that if there is some doubt concerning reliability,[26] less weight can be attached to the piece of evidence in question. This point is significant insofar as jury trials in Singapore have been abolished;[27] in other words, in any given trial, the fact-finder

22 Pinsler, above n. 1 at 345–6.

23 *Law Society of Singapore* v *Tan Guat Neo Phyllis* [2008] 2 SLR(R) at [126].

24 *Muhammad bin Kadar* v *Public Prosecutor* [2011] 3 SLR 1205 at [146]–[147].

25 Ibid. at [140]–[147]. The statements in question here were not covered by provisions in the Evidence Act but by the Criminal Procedure Code 2010, below n. 29.

26 As will be explained, any doubts surrounding relevance must be resolved purely by the Evidence Act.

27 See A. Phang, 'Jury Trial in Singapore and Malaysia: the Unmaking of a Legal Institution' (1983) 25 Malaya LR 50. The Evidence Act, however, was drafted with the jury system in mind.

(the judge) is exposed to all the evidence (probative, prejudicial, or by any other name) right from the start.[28] I go on to list the other advantages of the proposed approach, but most crucially the proposed approach is consistent with the rules and the spirit of the rules found in the Evidence Act,[29] which, as already highlighted, is something made mandatory by s. 2(2) of the Evidence Act.

B. Preliminary speculations concerning the attraction to the concept

Before proceeding to the critique proper, perhaps the most obvious and pressing question at this point is, if indeed it is debatable that using the exclusionary discretion is incompatible with the Evidence Act, why have Singapore courts, both before and after *Tan Guat Neo Phyllis*, been so attracted to it?[30] Apart from the fact that the exclusionary discretion remains in popular usage in other common law jurisdictions, a few speculative explanations may be tentatively suggested, with the first two being interrelated. First, even though the Evidence Act contains provisions that address (though obviously not perfectly because of its age)[31] various traditional common law exclusionary rules such as similar fact,[32] character,[33] opinion,[34] and hearsay,[35] there is a glaring loophole. To illustrate, a piece of hearsay evidence is (theoretically) admissible only if it passes muster under the exceptions in the Evidence Act to its hearsay provisions.[36] However, it is actually

28 See also Margolis, above n. 6 at 42; Roberts and Zuckerman, above n. 8 at 75: 'judicial regulation of the admissibility might be regarded as serving three core objectives ... the jury is spared distraction by trivial and unhelpful evidence ... the judge is in a position to limit the scope of the jury's discretion to return questionable verdicts by excluding unreliable or unfairly prejudicial evidence ... function of rules of admissibility is to implement and reinforce the law's intrinsic normative commitments'. But with regard to jurisdictions operating without the jury system, see P. Murphy, 'No Free Lunch, No Free Proof: The Indiscriminate Admission of Evidence is a Serious Flaw in International Criminal Trials' (2010) 8(2) *Journal of International Criminal Justice* 539 at 546: 'trust is reposed in the ability of professional judges to evaluate the weight of evidence, and to exclude from their consideration irrelevant or unreliable evidence'. Indeed, the position in Singapore is that judges are more competent than jurors to deal with the negative effects of prejudicial evidence, and thus are able to assess all evidence objectively: see *Wong Kim Poh* v *Public Prosecutor* [1992] 1 SLR(R) 13 at [14]; *Tan Chee Kieng* v *Public Prosecutor* [1994] 2 SLR(R) 577 at [8]; *Tan Meng Jee* v *Public Prosecutor* [1996] SLR(R) 178 at [48].

29 As will be demonstrated below, the approach is also consistent with the rules and the spirit of the rules in the Criminal Procedure Code 2010 (Act 15 of 2010), the other statute that governs evidence law in criminal proceedings.

30 Roberts and Zuckerman, above n. 8 at 29.

31 Pinsler, above n. 12 at 385.

32 Evidence Act, Chapter 97, Revised Edition 1997, ss. 14–15.

33 Ibid. ss. 54–57. Sections dealing with modes of proof are omitted here.

34 Ibid. ss. 47–53.

35 Ibid. ss. 6, 24–40. Sections dealing with modes of proof are omitted here. Sections 24, 25, 27–30 were repealed in 2010, but were relocated to the Criminal Procedure Code 2010.

36 As mentioned above n. 35, some provisions have been relocated to the Criminal Procedure Code 2010.

also possible that the same piece of hearsay evidence may be made admissible by virtue of relevance defined broadly elsewhere in the Evidence Act.

This leads us to the second tentative explanation. For instance, as regards evidence obtained by entrapment, the Evidence Act does not quite envisage such a situation in the sense of expressly providing a rule to circumscribe its admissibility, and there is no provision in other statutes that deal with (loosely speaking) entrapment evidence either.[37] On the contrary, the Evidence Act has a number of provisions that arguably admit entrapment evidence readily. Two representative examples may be found in ss. 9 and 11(b)[38] (these two provisions come under the banner of 'general categories of relevant facts'):

> Facts necessary to explain or introduce a fact in issue or relevant fact, or which support or rebut an inference suggested by a fact in issue or relevant fact, or which establish the identity of any thing or person whose identity is relevant, or fix the time or place at which any fact in issue or relevant fact happened or which show the relation of parties by whom any such fact was transacted, are relevant in so far as they are necessary for that purpose.
>
> Facts not otherwise relevant are relevant if by themselves or in connection with other facts they make the existence or non-existence of any fact in issue or relevant fact highly probable or improbable.[39]

Conceivably, a lot of evidence can be found admissible under these provisions,[40] including entrapment evidence.[41] The scope of ss. 9 and 11(b) (or any provision concerning general categories of relevant facts for the matter) is only circumscribed by the fact that if a piece of evidence can be admitted via another Evidence Act provision that codifies an exception to a common law exclusionary rule,[42] then that provision arguably has to be applied in conjunction with either

37 Pinsler, above n. 1 at 346–55.

38 See also Tan, above n. 17 at 372; Evidence Act, s. 8(1) ('Any fact is relevant which shows or constitutes a motive or preparation for any fact in issue or relevant fact').

39 Pinsler, above n. 1 at 57–8.

40 See Chen S. Y., 'Revisiting the Similar Fact Rule in Singapore' [2011] *Singapore Journal of Legal Studies* 553 at 560. Indeed, s. 11(b) has been interpreted as setting out the *actus reus* requirement for the similar fact rule: see *Lee Kwang Peng* v *Public Prosecutor* [1997] 2 SLR(R) 569 at [44]–[46]. Unsurprisingly perhaps, the correctness of this interpretation has been questioned: see Ho H. L., 'An Introduction to Similar Fact Evidence' (1998) Singapore LR 166 at 190–1.

41 See Pinsler, above n. 1 at 56–7, Margolis, above n. 6 at 34.

42 That is, ss. 12–57 of the Evidence Act, which, together with ss. 5–11, belong to Part I: Relevancy of Facts.

s. 9 or 11(b)[43] (or any provision concerning 'general categories of relevant facts').[44] This circumscription, however, does not apply to entrapment evidence, and one may surmise that the discretion to exclude evidence has subconsciously become the court's residual gateway for admissibility (or more precisely, inadmissibility) of entrapment evidence and indeed any other evidence that avoids the said circumscription.[45] As will be explained, things might possibly be less complicated (and maybe more acceptable) if the use of the exclusionary discretion is confined to common law exclusionary rules not covered by the Evidence Act, but this is not the case. It is now settled law (certainly in Singapore) that the discretion can be exercised in the context of all common law exclusionary rules and executive improprieties (such as in *Muhammad bin Kadar*'s case, where the accused's statements were taken in deliberate breach of the statutory procedural requirements).[46]

The third explanation is less tentative (and therefore less speculative), but the reason for its plausibility is very recent. For years, it was wondered if Singapore courts could take a cue from civil cases and justify their broad remedial powers (such as invoking the exclusionary discretion) in criminal cases by pointing to an exercise of their inherent powers.[47] This broad line of reasoning only began to pick up real momentum after *Tan Guat Neo Phyllis*,[48] and was finally crystallised by the Court of Appeal in *Muhammad bin Kadar* when it said that the exclusionary discretion arises 'from an inherent jurisdiction of the court to prevent injustice at trial'.[49] The argument from inherent jurisdiction is attractive insofar as it

43 It is arguable because Singapore courts have not been consistent in interpreting the Evidence Act this way: Pinsler, above n. 1 at 42–3.

44 Ibid. at 41–53, 57–8, 369: the other possible circumscription is that the Evidence Act only says what evidence is admissible without mandating such evidence to be admitted. However, even if this is accepted, this in and of itself does not provide a test to determine admissibility, which is the real crux of the matter here.

45 If one were cynical, one might think that things have reached a stage (and indeed this was reached some time ago) where it is no longer feasible to consult the Evidence Act when considering the evidence—the statute is far too rigid, internally inconsistent, unwieldy, anachronistic, and complicated to navigate and should therefore be ignored as much as possible.

46 Pinsler, above n. 1 at 359; Manohar (ed.), above n. 11 at 65–6; *Law Society of Singapore* v *Tan Guat Neo Phyllis* [2008] 2 SLR(R) 239 at [76]; *Public Prosecutor* v *Mas Swan bin Adnan* [2010] SGHC 107 at [101]–[107]; *R* v *Sang* [1980] 1 AC 402 at 437–52. Such an expansive interpretation of the discretion can be found in England's Police and Criminal Evidence Act 1984, but Singapore does not have this statute.

47 See generally Goh Y. H., 'The Jurisdiction to Reopen Criminal Cases: a Consideration of the (Criminal) Statutory and Inherent Jurisdiction of the Singapore Court of Appeal' [2008] *Singapore Journal of Legal Studies* 395.

48 Pinsler, above n. 1 at 361–8.

49 *Muhammad bin Kadar* v *Public Prosecutor* [2011] 3 SLR 1205 at [52].

possibly circumvents the s. 2(2) problem and provides a normative justification for the exclusionary discretion (which will be addressed in greater detail in Part D below), but several counterpoints come to mind. First, the argument effectively presupposes that relevance under the Evidence Act does not amount to admissibility, but this remains a contentious point.[50] Secondly, extreme caution is always urged in the exercise of a court's remedial powers justified under the auspice of inherent jurisdiction, in that the precondition is that the circumstances of the case must be 'exceptional'.[51] Thirdly, such a constrictive requirement of 'exceptional' circumstances plainly does not square with the fact that, as mentioned, the exclusionary discretion as presently conceived can be applied expansively in the context of all common law exclusionary rules and executive improprieties, whether captured by the Evidence Act or otherwise. Fourth, while it is probably less controversial (but not without problems) to suggest that the court's inherent jurisdiction can be invoked to prevent an abuse of the judicial process so as to preserve its moral legitimacy,[52] *Muhammad bin Kadar*'s equating of inherent jurisdiction with the prevention of injustice is a substantially different and broader idea, and may constitute going one step too far (in terms of expanding what is supposed to be a narrow ambit of powers exercised pursuant to inherent jurisdiction).[53] Fifthly, even if inherent jurisdiction is limited to the power to prevent an abuse of process, there is reason to believe that power can actually be used to remedy entrapment issues[54]—a paradox arises though, when one considers that the defence of entrapment has been categorically rejected in Singapore. Finally, it may well be that the argument from inherent jurisdiction is also compatible with my proposed alternative approach, to which we now begin to turn, beginning with the two main criticisms of the concept of exclusionary discretion.

C. The first main problem of the concept: scope and operation of balancing probative value and prejudicial effect

The concept of exclusionary discretion ultimately involves the balancing or weighing of probative value and prejudicial effect. However, although this balancing test has been around for decades, few attempts have been made to

50 Pinsler, above n. 1 at 368–70.

51 Ibid. at 363.

52 See Tong, above n. 16 at 131–2, A. Ashworth, 'What is Wrong with Entrapment?' [1999] *Singapore Journal of Legal Studies* 293 at 309.

53 See also Ashworth, above n. 52 at 314.

54 Ibid. at 315–17, S. Bronitt, '*Sang* is Dead, Loosely Speaking' [2002] *Singapore Journal of Legal Studies* 374 at 374.

properly delineate its scope and operation.[55] Further difficulties arise when we consider that, based on common law developments around the world, there are virtually no limits as to the factual circumstances in which the balancing test can be applied, and once the test has been applied by a trial court, the appellate court has little room to interfere with the findings.[56] Also, it has never been clear as to whether 'probative value' refers to the contiguous concepts of logical relevance, legal relevance, or even something else altogether (or whether it factors in weight); academic opinions remain fundamentally divided, and Singapore courts have been silent on this.[57] Without resolving what probative value entails, it is impossible to even begin the analysis, let alone apply the balancing test. There is also no judicial explication or academic consensus on the meaning of 'prejudicial effect': if a piece of evidence has prejudicial effect, does it mean that it has prejudicial influence on the mind of the fact-finder out of proportion to its true evidential value, that it unfairly colours the mind of the fact-finder because it actually has no relevance whatsoever, or does it mean something else altogether?[58] Given that the Evidence Act contains no clear references to either probative value or prejudicial effect, it is even more important to be clear as to what the exclusionary discretion entails; indeed, without a Singapore court even attempting to define what these terms mean, it should not be lightly assumed (especially in light of s. 2(2)) that the exercise of the exclusionary discretion is compatible with the Evidence Act.

In any event, apart from the definitional issues, the balancing test faces problems in its conceptualisation and operation. For instance, in the context of the similar fact rule, the relevant admissibility provisions are found in ss. 14–15 of the

55 See Chen S. Y., 'Dealing with Unreliable Evidence', Singapore Law Watch Commentaries, Issue 1/August 2011 at 4. The genesis of the balancing test can probably be traced to *R* v *Sang* [1980] 1 AC 402, a decision certainly not bereft of criticism: see Tapper, above n. 3 at 202; Roberts and Zuckerman, above n. 8 at 26–30, 74. Much of the *Sang* confusion in England has, however, been clarified by the Police and Criminal Evidence Act 1984, s. 78: Tapper, above n. 3 at 202–8. Section 78(1) states that in any criminal proceedings, 'the court may refuse to allow evidence on which the prosecution proposes to rely to be given if it appears to the court that, having regard to all the circumstances, including the circumstances in which the evidence was obtained, the admission of the evidence would have such an adverse effect on the fairness of the proceedings that the court ought not to admit it'. English developments, of course, are also impacted by obligations under the Human Rights Act 1998.

56 See Keane, Griffiths and McKeown, above n. 14 at 44–61.

57 See Margolis, above n. 6 at 29–32; Tan, above n. 17 at 372; Ho, above n. 40 at 167–71. See also Roberts and Zuckerman, above n. 8 at 101–8.

58 See Tan, above n. 17 at 373–4; Chen, above n. 40 at 2–4; M. Hor, 'Similar Fact Evidence in Singapore: Probative Value, Prejudice and Politics' [1999] *Singapore Journal of Legal Studies* 48 at 50–1.

Evidence Act.[59] However, these provisions[60] cannot be said to accommodate readily the balancing test.[61] Even assuming, without conceding, that ss. 14–15 incorporates it, it is completely unclear whether one has to apply the balancing test in conjunction with ss. 14–15, or as an alternative to it.[62] Yet another question to be considered is whether a piece of evidence that has some probative value must also necessarily have some prejudicial effect, since both concepts can provide outcomes independently. The probative value of a piece of evidence is, on one theoretical view at least, objectively ascertainable and mostly immune from the idiosyncrasies and biases of the fact-finder.[63] A fact-finder's estimation of the probative value of a particular piece of evidence is thus supposed to be roughly identical to another fact-finder's. If probative value is taken to mean the probability of inferring guilt and prejudicial effect is taken to mean the probability of an unwarranted inference of guilt, a piece of evidence that is unlikely to give rise to a strong inference of guilt will have an equally limited prejudicial effect even if admitted; conversely, a piece of evidence with high probative value increases the risk of an unwarranted inference of guilt if the evidence is admitted.[64] The foregoing forms the theoretical construct; the likely reality, however, is that any given piece of evidence will be perceived as having both low and high probative value by different people at the same time.[65] The inability to accord an objective and immutable probative value to a piece of evidence will cause varying (unwarranted) levels of prejudice.[66] Accordingly, when evidence that should logically be given low probative value is mistakenly perceived as having high probative value,

59 Chen, above n. 40 at 5–7.

60 Section 14 states: 'Facts showing the existence of any state of mind, such as intention, knowledge, good faith, negligence, rashness, ill-will or good-will towards any particular person, or showing the existence of any state of body or bodily feeling, are relevant when the existence of any such state of mind or body or bodily feeling is in issue or relevant.' Section 15 states: 'When there is a question whether an act was accidental or intentional or done with a particular knowledge or intention, the fact that such act formed part of a series of similar occurrences, in each of which the person doing the act was concerned, is relevant.'

61 Chin, above n. 4 at 69; Chen, n. 40 at 7–8.

62 Chen, above n. 40 at 7–8. Exacerbating the confusion is that for the similar fact rule, there is arguably an additional (common law) consideration of 'striking similarity', in that if a piece of evidence is so strikingly similar that to exclude it would affront common sense, the evidence should be admitted.

63 P. B. Carter, 'Forbidden Reasoning Permissible: Similar Fact Evidence a Decade after *Boardman*' (1985) 48 Malaya LR 29 at 36.

64 See *McGovern* v *HM Advocate* 1950 SLT 133 at 135 where it was 'obvious' to Lord Cooper that because the evidence was strong, admission of that evidence 'must to a substantial extent have prejudiced the appellants in the minds of the jury'.

65 See generally D. Kaye and J. Koehler, 'The Misquantification of Probative Value' (2003) 27(6) *Law and Human Behavior* 645.

66 T. Gibbons and A. Hutchinson, 'The Practice and Theory of Evidence Law' (1982) 2 *International Review of Law and Economics* 119 at 123.

prejudicial effect in the form of the risk of an unwarranted inference of guilt becomes more significant than it should be if the proper probative value was given.

By way of a more concrete illustration, evidence of an accused's criminal history is generally inadmissible[67] because it may 'invoke the [inescapably] deep tendency of human nature to punish'.[68] Indeed, this human tendency conflicts with numerous studies that have concluded that at least in respect of specific types of conduct, the belief that past behaviour is indicative of future misconduct is likely false.[69] Presumably there will be prejudicial effect if the trier of fact attaches more weight to a piece of evidence than it deserves. This is perhaps what Lord Cross meant in *Boardman* v *Director of Public Prosecutions* when he explained the substance of the exclusionary discretion as 'not that the law regards such evidence as inherently irrelevant but because it is believed that if generally admitted, jurors would in many cases think that it was more relevant than it was ... [such that] its prejudicial effect would outweigh its probative value'.[70] In theory, as explained, evidence with high probative value will naturally result in greater prejudicial effect and vice versa. Under this view, there is nothing to balance. Under the approach that accounts for the reality of human behaviour, the balancing test is just as incoherent. This is because prejudice only occurs when human behaviour results in undeserved weight being attached to a piece of evidence.[71] Yet, at the same time, one can only determine if weight is attributed undeservedly after the probative value has been factored in, as it cannot be said that there is undeserved emphasis placed on the evidence without reference to its probative value. Ergo, the balancing test is subsumed within the concept of prejudicial effect and it is illogical to then balance prejudicial effect against the probative value of the evidence a second time.[72] All things considered, the weighing of the prejudicial effect of a piece of evidence against its probative value is an exercise in

67 *Tan Meng Jee* v *Public Prosecutor* [1996] 2 SLR(R) 178 at [48].

68 H. J. Wigmore, *Evidence in Trials at Common Law*, P. Tillers rev. (Little, Brown: Boston, 1983) 1185. See also S. Lloyd-Bostock, 'The Effects on Juries of Hearing About the Defendant's Previous Criminal Record: A Simulation Study' [2000] Crim LR 734 at 753–5; T. Eisenberg and V. Hans, 'Taking a Stand on Taking the Stand: The Effect of a Prior Criminal Record on the Decision to Testify and on Trial Outcomes' (2009) 94 Cornell LR 1353 at 1357, 1380–5.

69 See generally T. Lyon and J. Koehler, 'The Relevance Ratio: Evaluating the Probative Value of Expert Testimony in Child Sexual Abuse Cases' (1996) 82 Cornell LR 43; D. Davis and W. Follette, 'Rethinking the Probative Value of Evidence: Base Rates, Intuitive Profiling, and the "Postdiction" of Behavior' (2002) 26 *Law and Human Behavior* 143.

70 [1974] 3 WLR 673 at 702.

71 See R. Margolis, 'Evidence of Similar Facts, the Evidence Act, and the Judge of Law as Trier of Fact' (1988) 9 Singapore LR 103 at 105.

72 This was alluded to in *Tan Meng Jee* v *Public Prosecutor* [1996] 2 SLR(R) 178 at [50].

abstraction.[73] Such high generality may have been deliberate so as not to unnecessarily fetter judicial discretion,[74] but the practical result is the inability to provide clear guidance to those subject to, or seeking to apply, the discretion in the first place.[75] There may well be no solution to the difficulties inherent[76] in the operation of the balancing test, but perhaps the time has come to evaluate alternatives to the balancing test, at least in the context of Singapore; indeed, of equal importance for our attention is the fact that there is still no consistent theory that explains the fundamental basis for the exclusionary discretion.

D. The second main problem of the concept: unsatisfactory justificatory theories

Many theories abound as to what justifies the exclusionary discretion, but it suffices to deal with just two for now (the justification of inherent jurisdiction of the court having been dealt with above). The one perhaps most widely used is the idea of fairness of trial.[77] However, while the idea of fairness of trial may be conceived to include broader, non-epistemic considerations such as rights protection and the moral legitimacy of the criminal justice process, the cases seem to define fairness of trial more narrowly.[78] This was certainly so in *Sang*,[79] the highly influential House of Lords decision that gave a modern restatement of the common law exclusionary discretion.[80] Lord Diplock conceived a fair trial as necessarily excluding information likely to influence the mind of the fact-finder that is 'prejudicial to the accused [and] which is out of proportion to the true probative value of that evidence'.[81] For Lord Scarman, three principles were inherent in a fair trial, one of which being 'no man is to be convicted except upon the probative effect of legally admissible evidence'.[82] In the Canadian Supreme Court decision of *R* v *Harrer*, McLachlin J stated that 'judges have the power to exclude evidence where its admission would render the trial unfair'.[83] She explained that a 'fair trial' is one that is neither the most advantageous trial for the accused nor the perfect trial; a fair trial 'is one that satisfies the public interest in getting at the truth, while preserving basic procedural fairness to the accused'.[84] In describing

73 See A. Duff, L. Farmer, V. Tadros and S. Marshall, *The Trial on Trial* (Hart: Oxford, 2007) 256.
74 *R* v *Samuel* [1988] 2 WLR 920 at 934.
75 C. Tapper, 'The Law of Evidence and the Rule of Law' (2009) 68(1) Camb LJ 67 at 71.
76 *Tan Meng Jee* v *Public Prosecutor* [1996] 2 SLR(R) 178 at [51].
77 See Roberts and Zuckerman, above n. 8 at 74.
78 Ibid. at 75.
79 *R* v *Sang* [1980] 1 AC 402 at 455. *Sang* remains good law in Singapore. See also Bronitt, above n. 54 at 375.
80 See Roberts and Zuckerman, above n. 8 at 74; Keane, Griffiths and McKeown, above n. 14 at 55; Tan, above n. 17 at 377–86.
81 *R* v *Sang* [1980] 1 AC 402 at 436–7.
82 Ibid. at 455.
83 *R* v *Harrer* [1995] 3 SCR 562 at [41].
84 Ibid. at [45].

what 'basic procedural fairness' might entail, however, McLachlin J gave the example of a piece of evidence that is obtained in a way such that its 'potential for misleading the trier of fact may outweigh such minimal value it might possess'.[85] Seen in this light, McLachlin J's proposition seems to be no different from Lord Diplock and Lord Scarman in *Sang*, and indeed, both decisions essentially refer to the balancing test (of probative value and prejudicial effect).[86] However, it should be noted that McLachlin J also pointed out that 'Evidence may render a trial unfair for a variety of reasons. The way in which it was taken may render it unreliable ... the police may have acted in such an abusive fashion that ... the admission of the evidence would irremediably taint the fairness of the trial itself'.[87] Perhaps, then, the justification for the exercise of exclusionary discretion, as in both *Harrer* and *Sang,* is not so much open-ended concepts such as justice or fairness[88] (or indeed, 'basic procedural fairness'), but, at bottom, reliability (of the evidence).[89]

Turning to Singapore, as mentioned in Part B above, the Court of Appeal in *Muhammad bin Kadar* said that exclusionary discretion can be justified by the court's inherent jurisdiction to prevent injustice at trial, and followed the *Sang* proposition that the exclusionary discretion is 'co-extensive' with the duty of a

85 Ibid. at [46].

86 Notably, *Harrer* cited *Kuruma Kaniu* v *The Queen* [1955] AC 197, a case that was also cited by the Singapore Court of Appeal in *Cheng Swee Tiang* v *Public Prosecutor* [1964] MLJ 291 for the proposition that evidence can be excluded if it caused unfairness to an accused. However, *Cheng Swee Tiang* has been questioned in the following terms: 'Although the court identified the conflicting interests at stake (the protection of the individual's rights and the admissibility of relevant evidence ...) ... it did not formulate how this proposition was to be applied in the exercise of the discretion ... the admissibility of evidence at trial is not concerned with a breach of the accused's rights, which is a matter of administrative or tort law and disciplinary action against the police. Moreover, it may be contended that the improper manner of obtaining relevant evidence should not bear upon admissibility because its probative value remains unaffected': Pinsler, above n. 1 at 348–9.

87 *R* v *Harrer* [1995] 3 SCR 562 at [46].

88 Ibid. at [44]: 'Whether a particular piece of evidence would render a trial unfair is often a matter of some difficulty ... unfairness in the way evidence is taken may affect the fairness of the admission of that evidence at trial, but does not necessarily do so'. See also Keane, Griffiths and McKeown, above n. 14 at 58–60.

89 It is further submitted that considerations of reliability and fairness should not be seen as indistinguishable. As Roberts and Zuckerman (above n. 8 at 179) rightly point out, there are at least four distinct rationales that can justify the exclusion of (relevant) evidence: reliability, rights protection, deterrence, and moral integrity (of the verdict). However, in England at least, the authors note that up until the Police and Criminal Evidence Act 1984 was passed, rights protection and moral integrity were not used to justify the exclusion of evidence (indeed, even after the legislation was passed, it has not been justified consistently on the same rationales). In this regard, insofar as Singapore does not have a similar statute, or at least insofar as Singapore's Evidence Act is quite a different piece of legislation motivated predominantly by considerations of relevance and reliability (see below), it will be difficult to rely on jurisprudence and justifications that emerge from the Police and Criminal Evidence Act 1984.

judge to ensure a fair trial.[90] Thus it may appear that *Muhammad bin Kadar* justified the exclusionary discretion solely on the basis of the need for a fair trial. Even assuming this is true, this basis must nevertheless be limited to fairness that centres its attention on the outcome of the trial, and not fairness of the entire process of the trial (beginning with the investigations before the trial and ending with the verdict). This must be so given the position established by *Tan Guat Neo Phyllis* that although the court has the discretion to exclude admissible evidence if this averts obvious injustice at trial, it may not have the discretion to exclude improperly obtained evidence unless the circumstances are exceptional.[91] Moreover, the Court of Appeal in *Muhammad bin Kadar* cautioned that 'courts should refrain from excluding evidence based only on facts indicating unfairness in the way evidence was obtained',[92] and coupled with the court's multiple references to 'reliability' when justifying the exclusionary discretion (this will be expounded in Part E below), perhaps the better view is to interpret the references to fair trial in *Muhammad bin Kadar* as placing emphasis on ensuring a reliable conviction (which was in effect the case in *Sang* and *Harrer* as well).[93] Indeed, every self-respecting court will always strive to ensure that fairness and/or justice prevails; to say that the exclusionary discretion is justified on the basis of fairness and/or justice is, with respect, not saying very much—or saying too much, if it is accepted that powers exercised pursuant to the inherent jurisdiction of the court should be limited to preventing abuses of process specifically and not preventing injustice generally.[94]

In view of cases such as *Muhammad bin Kadar*, what about another theory most commonly invoked, the need to ensure minimum standards of law enforcement?[95] This theory was, however, correctly rejected by *Muhammad bin Kadar*. Although the Court of Appeal expressed the hope that with the exclusionary discretion power, law enforcement officers would have less incentive to breach procedural safeguards, it emphasised that courts should be 'careful to avoid basing the exercise of exclusionary discretion primarily on a desire to discipline the wrongful

90 *R* v *Sang* [1980] 1 AC 402 at 436, 454.

91 *Law Society of Singapore* v *Tan Guat Neo Phyllis* [2008] 2 SLR(R) 239 at [124]–[127]. See also *Wong Keng Leong Rayney* v *Law Society of Singapore* [2006] 4 SLR(R) 934 at [64].

92 *Muhammad bin Kadar* v *Public Prosecutor* [2011] 3 SLR 1205 at [68].

93 See also Tapper, above n. 3 at 196–7, where *R* v *Sang* [1980] 1 AC 402 was interpreted to distinguishing between 'those in which the court is concerned to afford the accused a trial the outcome of which is likely to be reliable, and those in which it is concerned to afford him fair treatment'.

94 For an opposing view, see Roberts and Zuckerman, above n. 8 at 179–91.

95 See A. Ashworth, 'Excluding Evidence as Protecting Rights' [1977] Crim LR 723 at 724; P. Mirfield, *Silence, Confessions and Improperly Obtained Evidence* (Clarendon Press: Oxford, 1997) 321; I. Dennis, *The Law of Evidence*, 2nd edn (Oxford University Press: Oxford, 2002) 24–8.

behaviour' of law enforcement officers, including the prosecution.[96] It can be said, of course, that the judiciary has a duty to keep law enforcement officers in check and to prevent the courts from abetting flagrant improprieties by the police or to be perceived as instruments of illegalities (and this brings us back to the point about inherent jurisdiction discussed above).[97] Be that as it may, this consideration cannot be flipped around to justify a deliberate decision to acquit an accused even in the face of evidence with high probative value pointing towards guilt. It should not be assumed that law enforcement officers will be punished just because a guilty person escapes conviction as a result of procedural impropriety on the part of the law enforcement officers. Such an assumption rests on untenable premises. The first is that law enforcement officers inevitably derive some satisfaction at obtaining a conviction of an accused. The second is that upon being informed that it is their non-compliance with procedural rules which resulted in the court's decision to acquit an accused who would otherwise have been convicted, the law enforcement officers would suddenly strive to comply with procedural rules.[98] As one commentator puts it, 'we are punishing the public if we fail to convict the factually guilty by rendering crucial evidence inadmissible; the police officer responsible does not suffer any sanction at all'.[99] Indeed, there are many other avenues which are more appropriate in resolving improper conduct, such as civil proceedings, prosecution of miscreant law enforcement officers,[100] and internal disciplinary proceedings. These avenues may be more appropriate especially since in Singapore most, if not all, procedural lapses are individual rather than systemic.[101] Even if there were a systemic culture of procedural impropriety, it is difficult to see the court's role and effectiveness in eradicating such a culture.[102] Thus, except where expressly

96 *Muhammad bin Kadar* v *Public Prosecutor* [2011] 3 SLR 1205 at [68].

97 M. Gelowitz, 'Section 78 of the Police and Criminal Evidence Act 1984: Middle Ground or No Man's Land' (1990) 106 LQR 327 at 341.

98 Dennis, above n. 95 at 86; W. Twining, *Rethinking Evidence* (Northwestern University Press: Evanston, IL, 1994) 363–4; P. Duff, 'Admissibility of Improperly Obtained Physical Evidence in the Scottish Criminal Trial: The Search for Principle' (2004) 8(2) Edinburgh LR 152 at 166.

99 Duff, above n. 98 at 161. See also Roberts and Zuckerman, above n. 8 at 186: 'if... it is sometimes morally permissible ... for law enforcers to breach rights, why ever would we want to deter them from doing so on such occasions? Even with regard to those potential rights violations that we do want to deter, moreover, it will often seem perverse to employ an exclusionary remedy in the name of enhancing citizens' freedom and security.'

100 This was suggested by the court in *Law Society of Singapore* v *Tan Guat Neo Phyllis* [2008] 2 SLR(R) 239 at [147] as a possible course of action against improper actions of police officers.

101 See generally Chen S. Y. and E. Chua, 'Wrongful Convictions in Singapore: A General Survey of Risk Factors' (2010) 28 Singapore LR 98.

102 See also Roberts and Zuckerman, above n. 8 at 188: 'All in all, the exclusionary rule appears to be an astonishingly inept tool for deterring official misconduct, even on the contestable assumption that the police should always be deterred from breaking the law.'

required by statute,[103] the court should not exclude evidence simply on the basis that it is necessary to uphold minimum standards of law enforcement. *Muhammad bin Kadar*'s confirmation that the law on criminal procedure and evidence is not the proper tool to enforce disciplinary standards of police conduct is correct.

E. The proposed approach of relevance and reliability as the twin touchstones for admissibility and its advantages

As pointed out in Part D above, a careful reading of *Muhammad bin Kadar* will reveal that while it clearly rejected minimum standards of law enforcement as the predominant justification for the exclusionary discretion, it was less clear if it also rejected fairness of trial as the predominant justification (especially since it said that the court's exclusionary discretion arises 'from an inherent jurisdiction of the court to prevent injustice at trial').[104] However, the Court of Appeal referred to the idea of reliability at least nine times in the course of justifying the exercise of its discretion to exclude the accused's statements to the police, stating that the recording of the statements suffered from serious and deliberate procedural lapses.[105] It may be helpful to reproduce some of the more pertinent extracts from the judgment to illuminate the point:

> [T]here is no reason why a discretion to exclude voluntary statements from accused persons should not exist where the prejudicial effect of the evidence exceeds its probative value ... the very reliability of the statement sought to be admitted is questionable ... This is already the settled position under the [Evidence Act] ...
>
> [P]rocedural irregularities may be a cause for a finding that a statement's prejudicial effect outweighs its probative value ... the rules ... for the recording of statements are ... to provide a safeguard as to reliability ...

103 See Police and Criminal Evidence Act 1984, s. 78; Canadian Charter of Rights and Freedoms (1982), s. 24(2). Section 24(2) states: 'Where, in proceedings under subsection (1), a court concludes that evidence was obtained in a manner that infringed or denied any rights or freedoms guaranteed by this Charter, the evidence shall be excluded if it is established that, having regard to all the circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute.' See also US Federal Rules of Evidence, Rule 403: 'The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence.'

104 *Muhammad bin Kadar* v *Public Prosecutor* [2011] 3 SLR 1205 at [52].

105 Ibid. at [55]–[68].

> [W]ritten statements taken by the police are often given more weight by finders of fact as compared to most other kinds of evidence. This is because formal statements taken by the police have the aura of reliability ...
>
> Police investigators are aware when they record statements that they are likely to be tendered as evidence before a court and there is therefore an uncompromising need for accuracy and reliability ... a court should take a firm approach in considering its exercise of the exclusionary discretion in relation to statements recorded by the police in violation of the relevant [statutory] requirements ...
>
> [T]he breaches ... [in the recording of the two statements] ... are serious enough to compromise in a material way [their] reliability ... it is not apparent to us that the probative value of the two statements can be said to exceed the prejudicial effect of the statements against their maker ...
>
> ... both statements should have been found inadmissible under the exclusionary discretion. The burden was on the Prosecution to convince the court that the probative value of each of the two statements, which had been compromised by the manifest irregularities that took place when each of them was supposedly recorded, was higher than their prejudicial effect ...[106]

Indeed, apart from the far greater number of references to reliability,[107] insofar as the Court of Appeal also identified that the touchstones for admissibility of evidence in criminal proceedings in Singapore are to be 'materiality' and 'credibility',[108] it may reasonably be assumed that the court was in effect conceptualising any notion of fairness (as opposed to rejecting fairness altogether) in terms of the potential reliability/unreliability of the evidence, rather than something that is broader, non-epistemic, or more normative.[109] It is this assumption that forms the foundation of my proposed approach: to use, as the Court of Appeal suggests, relevance and reliability (since it should not be fanciful to assume that 'materiality'

106 Ibid. at [55]–[56], [58], [60], [146]–[147].

107 As compared to just a single reference to fairness/justice in its discussion of whether to exclude the evidence.

108 *Muhammad bin Kadar* v *Public Prosecutor* [2011] 3 SLR 1205 at [117]: '[o]ur statutory rules of admissibility as governed by the CPC, the CPC 2010 and the [Evidence Act] impose a certain minimum standard of credibility and materiality'.

109 See also above nn. 55, 89, 103.

and 'credibility' essentially correspond to 'relevance' and 'reliability' respectively) as the twin and only touchstones for admissibility. However, to be clear, unlike *Muhammad bin Kadar*, my proposed approach calls for a different framework for admissibility: instead of using the balancing test (probative value versus prejudicial effect) to determine if a piece of evidence should be admitted or excluded; instead of asking whether there is any unfairness or injustice to be prevented; and instead of calling upon the court's residuary discretion and inherent powers to exclude otherwise admissible evidence, the appropriate (and narrower) question to ask after a piece of evidence is deemed relevant (as determined by the Evidence Act) is whether that evidence is also reliable. The reliability of a piece of evidence will depend on the facts of each case, with references to the requirements established by statute (such as the Evidence Act and Criminal Procedure Code 2010[110]). In contrast, the balancing test, in asking whether there is any unfairness or injustice to be prevented and relying on the court's residuary jurisdiction, will depend on vague notions of prejudicial effect, unfairness or injustice conceptualised broadly, and the hazy sense of when recourse to the court's inherent jurisdiction is acceptable. Under my proposed framework, once the threshold of reliability is satisfied, the evidence is admissible—there is no residual discretion exercisable to deny admissibility of the evidence.[111] It is submitted that this approach is simpler and neater than that applied in *Muhammad bin Kadar*. However, how does one reach the conclusion that admissibility should be determined only with reference to relevance and reliability?

As regards relevance, insofar as almost a third of the Evidence Act is devoted to relevancy provisions, it is clear that relevance is one of the touchstones of admissibility.[112] While it remains debatable as to whether Stephen meant logical or legal relevance (the evidence is unclear),[113] it does not matter here because it does not change the fact that for a piece of evidence to be admissible, it must satisfy the relevant relevancy provisions of the Evidence Act (as opposed to some common law conception of relevance). As regards reliability, it is by no means a novel idea that it also forms a key foundation for the admissibility of evidence in criminal proceedings. Indeed, Singapore courts routinely refer to reliability as the most crucial consideration when admitting evidence.[114] Reliability focuses the inquiry

110 Above n. 29.

111 See also Tapper, above n. 3 at 194–5; Roberts and Zuckerman, above n. 8 at 29.

112 Margolis, above n. 6 at 28.

113 Tan, above n. 17 at 371–3.

114 See *Fung Yuk Shing* v *Public Prosecutor* [1993] 2 SLR(R) 771 at [13]; *Public Prosecutor* v *Dahalan bin Ladewa* [1995] 2 SLR(R) 124 at [29]; *Public Prosecutor* v *Huang Rong Tai* [2003] 2 SLR(R) 43 at [27]–[35]. See also R. Pattenden and A. Ashworth, 'Reliability, Hearsay Evidence and the English Criminal Trial' (1986) 102 LQR 292 at 326; D. Schwartz, 'A Foundation Theory of Evidence' (2011) 100 Georgetown LJ 95 at 104.

into the safeness of using the particular evidence in arriving at its verdict; if ensuring that the right person is convicted is a fundamental objective of the criminal justice system, it follows that reliability must be a touchstone for the admissibility of evidence in criminal proceedings. But the reason why reliability emerges alongside relevance as the touchstone for admissibility is that a close and thorough examination of the Evidence Act will reveal that Stephen's conception of relevance is best understood as something that is rationally probative, but undergirded by considerations of reliability at the same time. A sampling of some of the Evidence Act's provisions on specific categories of relevant facts (the exceptions to common law exclusionary rules) would fortify the point. For instance, it has been said that the statute's hearsay provisions exist to guard against the 'danger of unreliability' of evidence not directly perceived or given under a conflict of interest,[115] while its opinion provisions exist to guard against a witness's 'subjective reaction [that] may be unreliable'.[116] But even if the consideration of reliability resonates throughout the Evidence Act, how does this impact the applicability of the exclusionary discretion? We need look no further than another exclusionary rule—that of similar fact. As mentioned earlier, there are issues with reading the balancing test of the exclusionary discretion into ss. 14–15 of the Evidence Act. The Court of Appeal in *Tan Meng Jee* nevertheless considered the balancing test to be embodied in ss. 14–15, but the problem is that it further held that 'similar fact evidence is always prejudicial … in reality, what is "similar" enough [to be admitted] is only so because its prejudicial effect has been outweighed by the sheer probity of the similar fact evidence'.[117] The better way forward is to say that a similar fact only has requisite probative value, and is therefore relevant, if it corresponds to the specific charge in question or demonstrates specific modus operandi.[118] Hence, as per the Evidence Act, the fact that a person has the habit of shooting at people with intent to kill is irrelevant when he is being tried for the murder of a specific person whereas the fact that he has previously tried to shoot the same person is relevant.[119] There is no need to balance probative value and prejudicial effect and, indeed, it is illogical to balance since similar fact evidence is inherently always prejudicial. Thus, if relevance and reliability are accepted as the twin touchstones for admissibility, all the court needs to consider is the similarity of the evidence to the charge. Only evidence with 'sheer probity' would be relevant.[120] Reliability becomes a relevant

115 See also the provisions relating to computer output (Evidence Act, ss. 35–36A) that were introduced only in relatively recent times.

116 Pinsler, above n. 1 at 100, 273. See also ch. 5.

117 *Tan Meng Jee* v *Public Prosecutor* [1996] 2 SLR(R) 178 at [49]–[50].

118 Chen, above n. 40 at 8–9.

119 *Tan Meng Jee* v *Public Prosecutor* [1996] 2 SLR(R) 178 at [49].

120 Ibid. at [50].

consideration if there is reason to question the veracity of the similar fact evidence—for instance, where the evidence provided dates back a long time.

There are several other advantages in adopting the proposed approach. In Singapore, criminal proceedings are also governed by the Criminal Procedure Code 2010, which was a timely overhaul of its decades-old predecessor. Indeed, there was a long, uncomfortable interface between the old Criminal Procedure Code and the Evidence Act partly because of inconsistencies in how their provisions were interpreted by Singapore courts.[121] Besides being consistent with the Evidence Act, the proposed approach has the benefit of being consistent with both the rules and the spirit of the rules found in the Criminal Procedure Code 2010, thus achieving interpretive parity between the two statutes. A representative illustration of the rules of the Code is the established threshold of 'inducement, threat or promise' that governs the voluntariness of an accused's statements.[122] This threshold is patently premised on reliability as a touchstone. Where an accused's free will has been sapped to the extent of causing him to make a statement he would not otherwise have made, the reliability of his statement is called into question and is excluded.[123] Two other examples are the various procedural preconditions that accompany hearsay evidence and an accused's statements to the authorities. As pointed out in *Muhammad bin Kadar*, the preconditions in the Criminal Procedure Code exist to ensure reliability of the evidence.[124] As regards the spirit of the rules, although Singapore has been known for its general preference for the crime control model over due process, there is now a paradigm shift towards the latter.[125] A key objective of the Criminal Procedure Code 2010 is the establishment of truth (in contrast to exclusively pursuing the objective of securing a conviction).[126] Truth and reliability are interdependent; truth can only be achieved if the premises needed to establish truth are reliable.[127] Thus, acknowledging reliability as a touchstone for admissibility is consistent with the paradigm shift. As opined, 'improvements to reliability

121 Pinsler, above n. 12 at 366–82.

122 Criminal Procedure Code 2010, s. 258.

123 See *Poh Kay Keong* v *Public Prosecutor* [1995] 3 SLR(R) 887 at [42]; *Chai Chien Wei Kelvin* v *Public Prosecutor* [1998] 3 SLR(R) 619 at [48]–[50].

124 *Muhammad bin Kadar* v *Public Prosecutor* [2011] 3 SLR 1205 at [55]–[60]. See also Criminal Procedure Code 2010, s. 258(5), which allows the use of the confession of a co-accused to be 'taken into consideration' by the court when determining the guilt of the accused who has been jointly tried for the same offence. Jurisprudence interpreting this provision makes it clear that reliability of the confession is the main consideration: Pinsler, above n. 1 at 164.

125 See generally Chen and Chua, above n. 101.

126 M. Chng, 'Modernising the Criminal Justice Framework: The Criminal Procedure Code 2010' (2011) 23 Singapore Academy of LJ 23 at 41, 43.

127 C. Elgin, 'True Enough' in E. Sosa and E. Villanueva (eds.), *Epistemology: Philosophical Issues* (Blackwell: Oxford, 2004) 114.

transform the crime control and due process objects of convicting the guilty and acquitting the innocent into "two sides of the same coin"'.[128]

Another advantage of the proposed approach is that it may remove any lingering uneasiness over potential double standards between entrapment evidence and other types of improperly obtained evidence. In *Tan Guat Neo Phyllis*, the court held that while improperly obtained evidence that is more prejudicial than probative may be excluded, the probative value of entrapment evidence is by definition 'greater than its prejudicial value in proving the guilt of the accused'.[129] With respect, this may be too wide a proposition, as entrapment may take various forms.[130] For instance, a significant distinction can be drawn between a police operation that merely happens to facilitate the commission of an offence by a recalcitrant offender (for that particular offence), and a deliberate police operation that actively and indiscriminately procures the commission of an offence by an otherwise law-abiding citizen who would not have committed the offence but for the operation.[131] Assuming that relevance is not an issue in both scenarios, in the first, the problem is less well expressed as one of potential prejudice than in terms of reliability (so that any conviction is safe and morally defensible) because there were definite grounds to suspect that the accused would eventually have committed the offence regardless of the operation. In contrast, in the latter scenario, the evidence is unreliable because the accused was effectively instigated by the state and the state alone into doing something he would otherwise not have done. Accordingly, if the balancing test is replaced by an inquiry into reliability, there is no need to engage in semantics to deny that there is no prejudice to the accused, or that there is no unfairness to the accused, as it is 'arguable that any form of impropriety involves unfairness to the accused if there is a denial of rights'.[132] The upshot of the proposed approach then is that it will be quite meaningless (and indeed, inaccurate) to speak of a judicial discretion to exclude evidence (whether using the balancing test or otherwise). Under the proposed approach, a piece of evidence in criminal proceedings is either admissible or inadmissible, based on the twin touchstones of relevance and reliability. It is unnecessary and unhelpful (and inconsistent with the Evidence Act) to introduce an extra dimension of discretion or excludability.[133] Should a court be

128 Chng, above n. 126 at 43.

129 *Law Society of Singapore* v *Tan Guat Neo Phyllis* [2008] 2 SLR(R) 239 at [125]–[126].

130 See generally Tapper, above n. 3 at 518–19, Bronitt, above n. 54. See also A. Roberts and D. Ormerod, 'The Trouble with *Teixeira*: Developing a Principled Approach to Entrapment' (2002) 6 E&P 38.

131 See *SM Summit Holdings* v *Public Prosecutor* [1997] 3 SLR(R) 138 at [52]–[57].

132 Pinsler, above n. 1 at 349.

133 For an opposing view see Pinsler, above n. 1 at 369–70, Tan, above n. 17 at 413–14.

unsure as to the precise reliability of a piece of evidence, it can always admit the evidence first and subsequently attach less weight to it if necessary. Attributing various levels of weight to a piece of evidence is yet another mechanism to improve the reliability and veracity of the evidence, and acts as a more useful discretion for the judge than the balancing test:

> [T]he balancing test must be considered a close relative of another generalised approach that has emerged from judicial practice—that of ... according different weight or no weight at all to the different pieces of evidence ... This approach makes sense ... because the court may want to take into account as many facts as possible to be apprised of the full picture... in Singapore's system where there is only judge and no jury, there is not much point in worrying that evidence is prejudicial because it may 'taint' the judge's judgment in some way—the judge will already have considered the evidence ... that Singapore has no jury system has also led the former Attorney-General, now current Chief Justice, to comment at one point that the balancing test 'should have little or no relevance in bench trials as the judge can simply give whatever weight is appropriate to the evidence'.[134]

The final advantage of the proposed approach is that it obviates the need for a distinct test that applies to all the (so-called) exclusionary rules, because reliability is capable of being a basis for the exclusionary rules (and any rule that curtails the admissibility of evidence compromised by executive improprieties) as well as a test in and of itself, and obviates any need for recourse to powers flowing from the court's inherent jurisdiction. The question that the fact-finder seeks to answer in every case is simply 'is the evidence relevant, and if so, is it reliable?' It is impossible to devise an all-encompassing test that will be applied in the same manner regardless of the context. Such a test will invariably be highly general and hence suffer from the same flaws as the balancing test. Instead, whether a piece of evidence is reliable depends on the facts of the case. Thus, assuming relevance is not in issue, the longstanding difficulties surrounding the classic hearsay cases such as *Ratten* v *The Queen*,[135] *Walton* v *The Queen*,[136] and *R* v *Kearley*[137] can be (and have been) reconciled by asking whether the hearsay evidence could possibly have been

134 Chen, above n. 40 at 9–10. There is also the possibility of using the rules of corroboration as a check, but see Chen S. Y., 'The Corroborative Effect of Lies', Singapore Law Watch Commentaries, Issue 2/November 2011 at 3: 'Corroboration as a distinct concept or a requirement [in Singapore] is superfluous'.

135 [1972] AC 378.

136 (1989) 84 ALR 59.

137 [1992] 2 AC 228.

fabricated or concocted—which is another way of asking if the evidence was reliable.[138] Taking procedurally irregular statements as another example, it is impossible to establish rigid rules about what kind of police conduct is so flagrant that it would immediately render evidence obtained unreliable.[139] In each case, it is not a question of the quantity or quality of irregularities, but whether the irregularities 'materially affect' the reliability of the statement.[140] As previous cases show, there is no difficulty in determining that the reliability of statements has been materially affected. In *Public Prosecutor* v *Mazlan bin Maidun*,[141] for instance, the failure to obtain a signature in, and the failure to inform the maker of a statement of his right against self-incrimination when making a cautioned statement respectively, evidently did not undermine the reliability of the content of the statements made.[142] On the flipside, where the police officer recorded the accused's statement on a note and did not read the statement back to the accused or obtain his signature, and later rewrote an expanded version of the statement and destroyed the original note, the reliability of the expanded statement was clearly suspect and the judge was right to consider the statement inadmissible.[143] Similarly, the procedural irregularities[144] in *Muhammad bin Kadar* undoubtedly cast serious doubts as to the reliability of the defendant's statements to the police and resulted in their inadmissibility. At any rate, in comparison to the balancing test, the intuitiveness of reliability as both the test and basis for admissibility is simpler and more attractive. Determining whether a particular piece of evidence is reliable need not entail a rigorous arithmetic assessment of the probability of its truth value. The objective is simply to determine if the evidence is sufficiently reliable. Indeed, any potential subjectivity of this inquiry is circumscribed by the fact that the Evidence Act already defines relevance in terms of reliability (and logical probity). The second circumscription is that determining whether any irregularities 'materially affect' the reliability of a piece of evidence is essentially an objective one; the prescribed criterion may sound broad, but it is submitted

138 See also Evidence Act, s. 6: 'Facts which, though not in issue, are so connected with a fact in issue as to form part of the same transaction are relevant, whether they occurred at the same time and place or at different times and places.'

139 H. Packer, 'Two Models of the Criminal Process' (1964) 113(1) University of Pennsylvania LR 1 at 32.

140 *Muhammad bin Kadar* v *Public Prosecutor* [2011] 3 SLR 1205 at [65].

141 [1992] 3 SLR(R) 968.

142 *Muhammad bin Kadar* v *Public Prosecutor* [2011] 3 SLR 1205 at [66].

143 *Public Prosecutor* v *Dahalan bin Ladewa* [1995] 2 SLR(R) 124 at [86].

144 Specifically, one of the accused had made two statements to a senior police officer. However, neither statement was recorded in compliance with the various procedural requirements (such as the immediate recording of the statement in a field diary, the tallying of the statement originally recorded and the statement recorded in the field diary, and the reading back of the statement) in the Criminal Procedure Code and the Police General Orders. There was also reason to believe that such non-compliance was deliberate and in bad faith.

that it is not any more likely than the balancing test to produce so-called arbitrary outcomes. Finally, the attachment of more or less weight to any piece of evidence that is suspect—and an accompanying explanation by the judge in his grounds of decision—will ensure greater accountability and consistency in the fact-finding process.

3. Concluding remarks

It seems necessary to conclude this piece by first briefly addressing what I think will be the main and fundamental objection to my proposed approach. The concept of a residuary judicial discretion to exclude relevant (and/or reliable) evidence on some notion of justice is, in my view, ultimately motivated by an impulse to protect both the rights of the accused and the integrity of the criminal justice process. Indeed, such an impulse has been justified by various scholars on non-epistemic and dignitarian grounds.[145] In this regard, it may be said that there are other aspects of the Evidence Act, hitherto unmentioned in this article, that run contrary to such an impulse. For instance, local commentators have pointed out that the Evidence Act contains provisions (not discussed in this piece) that erode the accused's fundamental right to the presumption of innocence,[146] and that key contemporary values such as procedural fairness, legitimacy in adjudication, and maximum individualisation are patently not captured by the rules of the antiquated and largely stagnant statute.[147] They argue that this makes the Evidence Act look anachronistic and ripe for legislative overhaul; indeed, Singapore may well be at a crossroads where it is on the verge of recalibrating its rules of evidence in criminal proceedings.

Nonetheless my response to the aforementioned objection is that first, even assuming, but not conceding, that the Evidence Act is disproportionately tilted in the prosecution's favour (or indeed, lacks due recognition to rights protection and the moral legitimacy of the criminal justice process), in a democracy such as Singapore only Parliament has the public mandate to either amend or repeal the statute, and Parliament is arguably in a better position to strike the appropriate balance between the rights of the accused and the interests of the

145 See generally Duff, above n. 98. See also above n. 55, n. 89, n. 103 for the argument that in England and Canada, the exercise of the court's exclusionary discretion is justified on non-epistemic and dignitarian grounds mainly because those jurisdictions have legislation that expressly provides for the discretion to be exercised on those bases.

146 M. Hor, 'The Presumption of Innocence—A Constitutional Discourse for Singapore' [1995] *Singapore Journal of Legal Studies* 365 at 369–89.

147 Chin, above n. 4 at 95–6.

community.[148] If anything, recent judicial[149] and statutory[150] developments (the Criminal Procedure Code 2010 being one of them) suggest that Singapore is increasingly placing an emphasis on reinforcing the integrity of the criminal justice process generally and protecting the rights of an accused specifically.[151] It may thus not be long before the Evidence Act is reconceptualised along similar lines, but until Parliament makes the necessary legislative change, the Evidence Act is here to stay and should be interpreted according to its terms in the most rational and consistent manner possible. Secondly, much as statutory fidelity is a virtue and should be upheld to the maximum extent possible (not to mention that it is also arguably a lesser evil as compared to ad hoc and piecemeal solutions by the courts),[152] the arguments I have raised against the concept of exclusionary discretion and the arguments I have raised in support of my alternative framework for admissibility do not emanate solely from fidelity to the Evidence Act.

To recapitulate, under the current framework for admissibility in Singapore, a piece of evidence in criminal proceedings is admissible if it is material or relevant. However, the court retains the residual discretion to exclude such evidence in certain situations, particularly when its prejudicial effect outweighs its probative value, or when its admissibility would result in injustice at trial. As mentioned, the use of such a discretion is ultimately motivated by moral considerations, and such considerations should not be ignored. However, it is submitted that my

148 See *ADP* v *ADQ* [2012] SGCA 6 at [30]: 'courts are not—and ought to not act as if they are—"mini legislatures"'. It should also be noted that unlike England, Singapore does not yet have any international human rights obligations akin to those found in the European Convention on Human Rights, ETS 5; it is also not bound by a court akin to the European Court of Human Rights.

149 For instance, *Muhammad bin Kadar* v *Public Prosecutor* [2011] 3 SLR 1205 is unprecedented in two ways: (1) the Court of Appeal created a new duty for the prosecution to disclose relevant but unused material; (2) the court used very strong language when it criticised the prosecution and the police with regard to certain pieces of evidence. *Thong Ah Fat* v *Public Prosecutor* [2011] SGCA 65 is another case that demonstrates the demand for a higher standard of accountability in criminal proceedings. The Court of Appeal criticised the trial judgment in unprecedentedly strong language, stating that the judgment was too brief and unclear, and held that the judicial duty to give reasons was not discharged.

150 For instance, the Criminal Procedure Code 2010 has been described as 'a new chapter in the continuing evolution of Singapore's criminal justice process': Chng, above n. 126 at 23. Chng also opines at 57 that it can no longer 'fairly be said that an unthinking preference for crime control values is all that the Singapore system is about'.

151 See also Chen S. Y., 'The Expanding Limits of Prosecutorial Discretion', Singapore Law Watch Commentaries, Issue 2/January 2012.

152 See Murphy, above n. 28 at 542: 'Not even the most dedicated defender of the [common law] rules of evidence can pretend that they are the result of any deliberate or systematic attempt to construct a consistent body of law. Rather they represent ad hoc, piecemeal efforts by trial judges ... to solve practical problems of litigation as and when they arose.'

proposed alternative framework for admissibility actually does not ignore such considerations. In arriving at my framework, I started out by arguing that the concept of exclusionary discretion is not as compatible with the Evidence Act as the Singapore courts currently assume, before pointing out that in any event, the concept suffers from various problems relating to its operation and normative justifications. Under my proposed approach, a piece of evidence in criminal proceedings is admissible only if it satisfies the twin touchstones of relevance (as determined by the Evidence Act) and reliability (as determined by the facts of each case, and where applicable, the rules in the Evidence Act and Criminal Procedure Code 2010). The requirements of relevance and reliability form one check to ensure that the rights of the accused and the integrity of the criminal justice process are upheld; indeed, in the example of entrapment evidence, it actually goes further than the balancing test in restricting the admissibility of such evidence. Although there is no further discretion to exclude a piece of evidence once it is deemed admissible (and not to mention that there are fundamental difficulties in calling upon the court's inherent powers to remedy any injustice), where there is some doubt, unease, or sense of unfairness, the trial judge can always attach less or very little weight to the piece of evidence in question and explain so accordingly in the grounds of the judgment or oral verdict. This is the second check to ensure that the rights of the accused and the integrity of the criminal justice process are upheld, although it is necessarily premised on the assumption that professionally trained trial judges in Singapore are well-equipped (or at least better equipped than lay jurors) to determine questions of reliability and weight in a way that is fairly consistent and non-arbitrary.[153]

All in all, it is humbly submitted that my proposed approach is the most principled one insofar as it establishes the building blocks to the start of the harmonisation of[154] the tenor and rules of the Evidence Act, the Criminal Procedure Code, and Singapore case law, while duly accounting for how the fact-finding process in criminal proceedings in Singapore works.

153 Above n. 28. It is submitted that this approach requires more discipline and rigour as compared with the approach of allowing a court to exclude relevant evidence whenever the court believes it will prevent unfairness or injustice.

154 However, for an example of a local legislative trend seemingly militating against my proposed approach, see the Ministry of Law's proposed amendments to the Evidence Act to 'broaden the scope of the existing hearsay exceptions and introduce various new exceptions ... To ensure that these broadened/new hearsay exceptions are not abused, the courts will be given an overriding discretion to exclude evidence in the interests of justice': Public Consultation on Proposed Amendments to the Evidence Act, <http://app2.mlaw.gov.sg/News/tabid/204/Default.aspx?ItemId=579>, accessed 23 July 2012). On closer inspection, though, the phrase 'courts will be given an overriding discretion to exclude evidence' actually suggests that the Evidence Act does not yet provide for such a discretion.